

2015

# Minority Justice Implementation Committee

## Annual Report

Minority Justice Implementation Committee activities From January, 2015  
through December, 2015.

12/5/2015



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# CONTENTS

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Introduction .....	1
Remembering My Friend, Jim Fitzsimmons: by Donovan Foughty .....	1
Andrew Frank: Outgoing Staff Attorney .....	2
Committee Activities.....	2
Access to Courts.....	3
• Jury Study .....	3
• Refreshing Jury Lists/Undeliverable Summons.....	4
• Court Interpreter Rules/Training .....	4
Criminal and Juvenile Justice .....	7
• Race in the Criminal Justice System Study.....	7
• Evidence-Based Sentencing .....	9
• Pretrial Evidence-Based Tools.....	10
• State-Tribal Relations – Cooperative Law Enforcement Agreements .....	12
• Juvenile Justice – Juvenile Detention Screening Tool .....	14
• Juvenile Justice – Cultural Liaison Programs.....	15
Civil Justice .....	16
• PASSPORT Protection Order.....	17
• Limited-Scope Services.....	19
• Self-Representation.....	21
Court Personnel and Legal Profession .....	21
• Education Program: Native American Law Students Association.....	22
Conclusion.....	23

## INTRODUCTION

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The North Dakota Minority Justice Implementation Committee (Minority Justice Committee) began work in 2013, following the recommendations of the Commission to Study Racial and Ethnic Bias in the Courts (Race and Bias Commission).<sup>1</sup> The Committee is charged with implementing recommendations from the Commission Final Report, which was based on the findings of a two-year study. The Commission collected testimony and statistical evidence to examine bias in as many areas of the court system as possible. Study areas included access to courts, criminal and juvenile justice, civil courts, the legal profession, court personnel, and public perceptions.

The Minority Justice Committee held its first meeting in July 2013. Members selected recommendations from each Commission study area for initial implementation. The Committee selected a mix of long- and short-term projects from several different subject areas in order to allow members the opportunities to participate and apply their expertise.

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## REMEMBERING MY FRIEND, JIM FITZSIMMONS: BY DONOVAN FOUGHTY

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I first met Jim Fitzsimmons in 1979 through a mutual acquaintance. He was working for Legal Services in New Town. I was working at the central office for the ND Highway Department in Bismarck. We traveled in the same social circle at that time.

I remember having a conversation with Jim in a social setting/bar about taking the LSAT and going to law school. I asked him how he liked being a lawyer. He said, in his low keyed manner, “the law is not for everybody, but I am sure having a good time.” He was an influence in my decision to enter law school.

Early on in my legal career Jim and I continued to cross paths. The law office I worked in had a contract to provide civil legal services on the Spirit Lake Nation. Because of that contract I was invited to attend an Indian Law Conference at Berkeley that Jim also attended. After that conference Jim and I continued to have an on-going conversation on various legal topics over the years. We sat on the Tribal/State Court Forum in the early 90's and after that the Committee on Tribal/State Court Affairs. We sat on the North Dakota Commission to Study Racial and Ethnic Bias in the Courts. At the time of his death we were on the Minority Justice Implementation Committee and the Justice Commission for Three Affiliated Tribes. Over the years we worked on legislation and rules together.

I considered Jim a friend. Reflecting back however it is kind of funny. Lawyers are funny people. Outside of the law I knew very little about my friend. I knew little about his family. He knew little or nothing about my family. Our common interest in the law defined our friendship.

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<sup>1</sup> North Dakota Commission to Study Racial and Ethnic Bias in the Courts: Final Report and Recommendations (2012).

James Fitzsimmons loved being a lawyer. The work he did of assisting the poor and disenfranchised gave him a great sense of satisfaction. Jim always enjoyed a good argument and he was not afraid to express his opinion. As others have observed, you may not always agree with Jim on the topic at hand, but Jim was never disagreeable. He had a lot of friends in the legal community. Jim worked hard to make the world a better place.

I miss you Jim!

Donovan Foughty

Chair, Minority Justice Implementation Committee

## **ANDREW FRANK: OUTGOING STAFF ATTORNEY, BY JUSTICE KAPSNER**

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Andrew Frank was hired as staff for the commission in May 2010. He came to the commission with a J.D. degree from Boston College Law School and a bachelor's degree from the University of Minnesota, majoring in sociology. That background was the fit the commission needed to do the studies the commission hoped to do to understand both actual and perceived bias in the courts. As staff, Andrew organized the meetings of the commission and kept the records of the commission.

Andrew organized eleven public meetings and additional focus groups throughout the state to take public testimony on issues before the commission. His background in sociology was particularly valuable to the research committee of the commission for data collection and analysis. Andrew worked on the development of survey instruments for people attending public meetings, court users' surveys, jury surveys, and attorney surveys. He worked extensively with the data provided by the Department of Corrections and with data collected by North Dakota Kids Count and the Association of Counties to review whether minority populations appeared to be disproportionately impacted in our criminal and juvenile justice programs.

Andrew was responsible for initially drafting the interim and final reports of the commission including its findings and recommendations. He continued his work with the commission through April 2013. Following that time Andrew served as staff to the Minority Justice Implementation Committee whose task is to implement the recommendations made by the commission until September 2015 when he left court employment for a position with the federal government.

## **COMMITTEE ACTIVITIES**

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This report contains short descriptions of study areas, recommendations, and Minority Justice Committee implementation efforts. The recommendations below are categorized according to the original Racial and Ethnic Bias Commission Final Report study areas. The text of the relevant Commission recommendations appears below each implementation subject heading.

## ***ACCESS TO COURTS***

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The Race and Bias Commission report focused on the issues of representative juries and language interpreter needs throughout the state under the heading of Access to Courts. The Minority Justice Committee selected the following recommendations for initial implementation.

- **JURY STUDY**

*A long-term or permanent study on jury panels must be undertaken before firm statistical conclusions on minority representation can be reached. Such study would provide information for the review of jury source lists. Courts should be required to request racial and ethnic information from all persons summoned, selected for, or granted excuses and deferrals from jury duty. This data must be collected, preserved, and reported yearly to the State Court Administrator.*

The main obstacle to assessing North Dakota jury representation has been the level of available data from various stages of the jury process, including the initial jury pools and the final panels. This difficulty increases when attempting to examine jury panels. Because only a small proportion of potential jurors serve on panels, collecting reliable state or county data requires long-term study timelines.

The Minority Justice Committee began efforts to collect demographic data on jury pools via survey in April 2014. The survey added a single demographic question to the juror questionnaire form which requests self-identification of race and ethnicity from a multiple-choice selection of Census categories. Both online and paper juror response methods have been modified to include the survey question. Additional text appears at the end of the jury questionnaire, after the signature line. The text includes an explanation of the study as well as the need to ensure that jury master lists adequately represent the state population. The explanation clearly indicates that the question is part of the Minority Justice Committee's study and does not require an answer if the potential juror is unwilling to participate. It also clarifies that the question is separate from the rest of the questionnaire and does not affect eligibility for jury service.

Data was collected statewide beginning in April 2014 and continues to be collected. Reports analyzing the collected data for 2014 and 2015 jury pool representation will be presented to the Minority Justice Committee during the 2016 meetings.

The Minority Justice Committee also began efforts in 2015 to collect demographic data related to the composition of jury pools through a "juror not found" report. This report is created through a comparison of the monthly deaths throughout the state to the master juror source list. Deceased individuals who are jury eligible whose names do not appear on the master juror source list are not being captured. If a pattern of exclusion of certain communities or minorities appears over time, this is indicative that the current method of creating jury pools is underinclusive and that the expansion of

jury lists may be necessary. Efforts continue to collect and analyze data on excluded jury-eligible individuals.

- **REFRESHING JURY LISTS/UNDELIVERABLE SUMMONS**

*Jury lists should be refreshed at least once per year to reduce undeliverable mailings.*

State and national studies have found a pattern of disproportionately low rates of jury summons returns for minorities. The Commission was unable to collect sufficient data to definitively prove disproportion in undeliverable mailings at the county level. However, available evidence suggested that several North Dakota counties bordering Indian Reservations appear to follow the broader national trend. Many states have adopted recommendations to increase the frequency of refreshing jury master lists to help alleviate these problems. The Commission found that most states have updated jury processes to refresh lists at least once per year. The North Dakota jury master list is generated from the lists of all of the actual voters in the last general election and supplemented with lists of licensed drivers and individuals holding state identification cards. North Dakota has traditionally updated its jury master lists every two years.

Court administrators identified additional benefits from more frequent refreshing of lists beyond addressing any existing disproportion from undeliverable mailings. For example, more frequent refreshing would allow more efficient use of resources by avoiding re-mailings. Administrators indicated that the process of refreshing and updating master lists has become easier than in the past because of improvements in technology.

Because the main jury source list is comprised of actual voters from the most recent general election, North Dakota continues to refresh this list every two years. As recommended by the Commission, however, North Dakota has begun to refresh the supplemental source list of licensed drivers and individuals holding state identification cards on an annual basis. In addition, deceased individuals are removed from the jury source list on a monthly basis. The Committee plans to continue to investigate methods and best practices to address undeliverable summonses.

- **COURT INTERPRETER RULES/TRAINING**

*Court Administrators should compile a list of interpreter resources and the languages they provide, and make this list accessible throughout the state, including it on the North Dakota Supreme Court website.*

*Courts should provide a periodic statewide training program for interpreters, covering court processes and the role of interpreters. Administrative Unit 2 can provide a model training program.*

*Courts should publish and encourage discussion of existing policies regarding payment for interpreter services outside of court.*

North Dakota has experienced growth in both racial and language diversity in recent years, especially in Fargo and Grand Forks.<sup>2</sup> Rural areas have drawn significant out-of-state populations because of recent economic developments. With the growth of language diversity, the use of interpreters for non- or limited-English speakers has become an important consideration for courts. The federal government and many states have attempted to address problems developing interpretation and translation services, with varying levels of success. North Dakota faces particular difficulties in this task because of its small population and the courts' sporadic need for a wide range of languages.<sup>3</sup>

The need for interpretation and the problems it presents will grow as the demographics of the state continue to change. Research has recognized that lack of interpretation for limited-English speakers creates a disadvantage for those individuals by preventing understanding of proceedings, hampering communication with attorneys, and limiting the ability to confront witnesses.<sup>4</sup> Non-English or limited-English speakers' inability to effectively communicate with the court system can create access to justice, due process, and assistance of counsel issues.<sup>5</sup> Individuals may lack the ability to effectively communicate with their attorneys, raising concerns about participation in their own defense. Non-English speaking defendants who lack effective interpreters are in a position of having to defend against charges that may be unknown or not fully understood.<sup>6</sup> The question arises whether a non- or limited-English speaker can truly be described as "present" at the court proceedings.<sup>7</sup>

Though court interpreting may seem to be a straightforward process, interpreters must not only understand and fluently speak a second language, they must also have adequate knowledge of legal terminology.<sup>8</sup> Interpreters must possess accurate, well-trained short-term memories to allow

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<sup>2</sup> North Dakota State Data Center, *Population by Race and Hispanic Origin in North Dakota: Census 2000 and July 1, 2008 Estimate*, 25 POPULATION BULLETIN (2009); see also U.S. Census Bureau, 2010 State and County QuickFacts: North Dakota (2010), <http://quickfacts.census.gov/qfd/states/38000.html>.

<sup>3</sup> MIGRATION POLICY INSTITUTE, TOP LANGUAGES SPOKEN BY ENGLISH LANGUAGE LEARNERS NATIONALLY AND BY STATE, ELL INFORMATION CENTER FACT SHEET 2, 4 (2010) [hereinafter MIGRATION POLICY INSTITUTE], available at [http://www.migrationinformation.org/ellinfo/FactSheet\\_ELL3.pdf](http://www.migrationinformation.org/ellinfo/FactSheet_ELL3.pdf) (noting that, unlike most other states, Spanish is not the top language spoken by English Language Learners in North Dakota, and that less than half of the North Dakota English Language Learners spoke the top language, indicating a greater than average number of languages needed); DEPARTMENT OF EDUCATION, CONSOLIDATED STATE PERFORMANCE REPORT FOR STATE FORMULA GRANT PROGRAMS, PART I 48 (2010) (indicating the top five languages spoken by Limited-English-Proficiency students throughout the state); RODNEY OLSON, AN ANALYSIS OF FOREIGN LANGUAGE INTERPRETER SERVICES PROVIDED FOR THE DISTRICT COURT IN CASS COUNTY, NORTH DAKOTA AND IMPROVEMENT RECOMMENDATIONS 15 (2009) (acknowledging the lack of a "main" foreign language need in Cass County, North Dakota's largest county and the county most likely to require interpreters because of resettlement of New Americans); CONFERENCE OF STATE COURT ADMINISTRATORS, WHITE PAPER ON COURT INTERPRETATION: FUNDAMENTAL ACCESS TO JUSTICE 4-5 (2007) [hereinafter CONF. OF ST. CT. ADMINISTRATORS], available at <http://cosca.ncsc.dni.us/WhitePapers/CourtInterpretation-FundamentalToAccessToJustice.pdf>.

<sup>4</sup> Virginia E. Hench, *What Kind of Hearing? Some Thoughts on Due Process for the Non-English-Speaking Criminal Defendant*, 24 T. MARSHALL L. REV. 251, 258 (1999); Richard W. Cole & Laura Maslow-Armand, *Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193 (1997); Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities*, 30 NEW ENG. L. RE. 227 (1996), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=870481](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870481); SUPREME COURT OF OHIO, INTERPRETERS IN THE JUDICIAL SYSTEM: A HANDBOOK FOR OHIO JUDGES, Introduction, available at [http://www.sconet.state.oh.us/publications/interpreter\\_services/ISHandbook.pdf](http://www.sconet.state.oh.us/publications/interpreter_services/ISHandbook.pdf) (last visited Nov. 9, 2011).

<sup>5</sup> CONF. OF ST. CT. ADMINISTRATORS, *supra* note 3, at 8, 16, 18.

<sup>6</sup> Hench, *supra* note 4, at 252-54; Cole & Maslow-Armand, *supra* note 4, at 194.

<sup>7</sup> Hench, *supra* note 4, at 254.

<sup>8</sup> See Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1 (1990) (discussing harm caused by bilingual attorneys attempting to act simultaneously as translators); Wanda Romberger, *The Provision of Court Interpreter Services in the 21st Century*, 49 JUDGE'S JOURNAL 2, 17 (2010).

simultaneous translation.<sup>9</sup> The most important requirement for interpretation is accuracy. Accuracy is defined as transferring source language concepts into the translated language, while conserving all of the elements of the original content and accommodating the patterns of the translated language to make it understandable.<sup>10</sup> Such subtle and difficult aspects of interpreting as hedges, false starts, repetition, as well as register, style, and tone fall under the umbrella of accuracy requirements, indicating that these aspects must be accurately conveyed between languages.<sup>11</sup> Interpreter additions or deletions of any kind, including summarizing and paraphrasing, are not considered acceptable.<sup>12</sup> Because of the importance of ensuring that all court participants understand the proceedings completely and accurately, North Dakota has revised its rules related to interpreter access and qualification.

On March 1, 2014, the North Dakota Supreme Court amended Rule of Civil Procedure 43 and Rule of Criminal Procedure 28 to require the court to provide an interpreter when someone with limited English proficiency or a deaf person is involved in a proceeding as a party, witness, or person with a significant legal interest or legal decision-making authority.

On August 1, 2015, additional rule amendments intended to supplement the 2014 changes took effect. Most of these amendments can be found in Administrative Rule 50, the rule on court interpreter qualifications and procedures. The rule now includes a new Section 2 on providing interpreters that specifies the situations when the court will provide a courtroom interpreter at no cost. These include all cases involving hearing impaired individuals and most cases involving persons with limited English proficiency. In the rare civil case when a person with limited English proficiency does not qualify for a free courtroom interpreter, the court will appoint an interpreter but may later seek reimbursement from a party based on ability to pay.

Under the amendments to Administrative Rule 50, payment for interpreter services outside the courtroom is the responsibility of the party who requested the service. If interpreter services outside the courtroom are requested on behalf of law enforcement, counsel for indigents, prosecutors or corrections agents, payment is the responsibility of the agency that requested the services or the political subdivision that appointed counsel.

Spanish and German are the most common non-English languages spoken in North Dakota, but a growing number of people speak Slavic languages, Somali, Chinese and Vietnamese. In June 2014, to address the need for more court interpreters to deal with a wider variety of languages, the court system sponsored its first court interpreter orientation training program. Thirty-eight individuals took

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<sup>9</sup> See Piatt, *supra* note 8, at 1; Romberger, *supra* note 8, at 17.

<sup>10</sup> NATIONAL ASSOCIATION OF JUDICIARY INTERPRETERS & TRANSLATORS, CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITIES [hereinafter NAT'L ASS'N OF JUDICIARY INTERPRETERS AND TRANSLATORS], *available at* <http://www.najit.org/about/NAJITCodeofEthicsFINAL.pdf> (last visited Nov. 9, 2011)

<sup>11</sup> *Id.*

<sup>12</sup> SUZANNE ZENG, INTERPRETER CODE OF ETHICS (Rev. 2008, used with permission); NAT'L ASS'N OF JUDICIARY INTERPRETERS & TRANSLATORS, *supra* note 10.

part in the program, speaking languages from Spanish, Bosnian, Hindi, Chinese and German to American Sign Language.

The court system offered a second orientation session in June 2015. The purpose of the training was to introduce participants to court interpreting as a profession. Topics covered were the role of the interpreter in court proceedings, professional responsibility and ethics, and overview of the North Dakota Court System and the modes of interpreting.

The court system has also developed a registration process for court interpreters and the North Dakota Court Interpreter Proficiency Test, which covers court terminology, ethics, and modes of interpreting. A “registered interpreter” is the highest designation for court interpreters on the North Dakota Court System Interpreter Roster. To become a registered interpreter a candidate must complete the one-day orientation program which introduces them to the court system, the role of a court interpreter, and the skills necessary to be a successful interpreter in a courtroom setting. Participants who attend an orientation program are then eligible to take the North Dakota Interpreter Proficiency Test. At its first offering in June 2015, 12 interpreters passed the test and received the designation of “registered interpreter.” They work in American Sign Language, Arabic, Chinese, Kurdish, Nepali, Somali, Spanish, Taiwanese, and Turkish.

Training for judges on working with interpreters in court has also been offered at the annual Judicial Conference. The training for judges covers due process issues, the role of the interpreter, interpreters in jury trials, and what can go wrong when information is not interpreted correctly.

The North Dakota Court System maintains a roster of interpreters of foreign languages and sign language to connect courts and other entities with interpreters whose services are available on a fee-basis. The roster is maintained on the North Dakota Supreme Court website at <http://www.ndcourts.gov/court/committees/courtinterpreters/roster.pdf>.

## ***CRIMINAL AND JUVENILE JUSTICE***

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The Commission study covered many criminal and juvenile justice issues. The Minority Justice Committee chose to focus initially on recommendations to adopt evidence-based tools at sentencing and pretrial stages. The Committee also encouraged the statewide expansion of a validated juvenile detention tool and joined in with a statewide data collection and justice reform effort.

- **RACE IN THE CRIMINAL JUSTICE SYSTEM STUDY**

*More detailed and long-term studies on race and the criminal justice system should be undertaken at all levels, especially in the areas of arrests, recidivism, and sentencing disparities.*

*The court should encourage the state to develop a retrieval mechanism for race and other data collected at the county and regional jail level.*

The Race and Bias Commission was not able to gather data on certain key study areas within its allotted duration and budget. For example, county-level data on pretrial detention was too inconsistent to allow collection and reliable analysis. An original study might have provided sufficient data, but would have required time and resources beyond that which was available to the Commission. Likewise, a detailed, original analysis of potential bias and sentencing would have required long-term case studies controlling for multiple variables.

Further, for the data that was available, there were limitations which may have misrepresented the actual number of crimes and type of offenders. For example, arrest rates in the 2012 Report measured one of two activities: police clearance rates for reported crimes;<sup>13</sup> or crimes that police observe directly.<sup>14</sup> Because of these limitations, the rates only reflected a portion of all crimes that occur. The majority of available data consisted of reported crimes rather than those witnessed by police officers. Police priority-setting and varying resources available for certain cases or categories of crime may have affected reported arrest rates, along with varying practical difficulties in making arrests for different crimes.<sup>15</sup>

The data that was available for the Race and Bias Commission Report demonstrated that minorities in North Dakota are disproportionately represented in arrests and incarceration, but a more in-depth analysis is needed to determine the cause of the disproportion and target driving factors.

In October 2015, North Dakota Governor Jack Dalrymple, Chief Justice Gerald VandeWalle, Attorney General Wayne Stenehjem, Senate Majority Leader Rich Wardner, House Majority Leader Al Carlson, Senate Minority Leader Mac Schneider, House Minority Leader Kenton Onstad, and Legislative Management Chairman Raymond Holmberg requested support from the Council of State Governments Justice Center (CSG) in exploring a “justice reinvestment” approach to reduce corrections spending and reinvest savings in strategies that can reduce recidivism and improve public safety. Phase I of the justice reinvestment approach will begin in Spring 2016 with CSG conducting a comprehensive analysis of extensive data sets collected from various state agencies to provide a broad picture of criminal justice trends in North Dakota. It is anticipated that the comprehensive CSG analysis will complete the gaps in the Commission study and provide a more detailed view of the arrest, pretrial, sentencing, and post-release stages of crime in North Dakota.

Based on the findings from these quantitative and qualitative analyses, the legislative Incarceration Issues committee will develop policy options for the 2017 legislature’s consideration that will address North Dakota’s key criminal justice challenges. The Minority Justice Committee will maintain

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<sup>13</sup> Clearance Rates refer to rates arrests for a given crime; a particular case is cleared when an arrest is made in that case, regardless of the ultimate outcome from that arrest. COLLEEN WELTZ, CRIME IN NORTH DAKOTA 2009: A SUMMARY OF UNIFORM CRIME REPORT DATA 2 (2010).

<sup>14</sup> ASHLEY NELLIS, JUDY GREENE & MARC MAUER, REDUCING DISPARITY IN THE CRIMINAL JUSTICE SYSTEM, THE SENTENCING PROJECT 5 (2008).

<sup>15</sup> *Id.* at 5.

involvement with the data collection, analysis, and recommendations to the Incarceration Issues Committee to establish reforms which reduce the disproportionate impact on North Dakota's minority populations.

- **EVIDENCE-BASED SENTENCING**

*Along with the sentencing factors of N.D.C.C. § 12.1-32-04, evidence-based sentencing practices and risk-assessment tools should be used.*

*Courts should provide training to judges in the use of research-based tools to incorporate sentencing practices.*

The Commission study found that racial and ethnic disparities increase over the course of the state criminal process from arrest to incarceration. Data revealed that the proportion of incarcerated minorities is substantially larger than the proportion of minorities arrested.<sup>16</sup> The Commission could not isolate and identify specific causes of disproportion during intervening stages because it lacked sufficient data on many system decision points. A complete determination would have required long-term case studies with large samples and a comparison with control groups. Causes of the increase between arrests and incarceration could include explicit or implicit bias, other causes correlating with bias, such as poverty, economic or social factors, or some combination of both.

The Commission found that providing evidence-based tools in the judicial decision process would create an objective reference point to combat any real or potential bias. An objective assessment tool would also help to address any effects of implicit bias, unconsciously applied stereotypes that affect decision-making.<sup>17</sup> Research supports the conclusion that decision makers can limit the effect of their own implicit bias if they are conscious of its existence.<sup>18</sup> An assessment tool can be applied to gain objective information, to increase the awareness of any unconscious bias in judges' decisions, and to help ensure consistent, reliable decision-making.

Evidence-based tools can provide many additional benefits, including increased program efficiency and increased cost-effectiveness. Many tools are capable of measuring both offender needs and the risk of future offenses. Matching offender needs to existing resources allows application of more effective treatment and support programs, which can help to reduce or eliminate future contact with the justice system. Research compiled by the National Institute of Corrections shows that benefits include

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<sup>16</sup> The population of minorities arrested, in turn, is significantly larger than the proportion of minorities in the state population. See NORTH DAKOTA COMMISSION TO STUDY RACIAL AND ETHNIC BIAS IN THE COURTS: FINAL REPORT AND RECOMMENDATIONS 75 (2012). The Commission study also notes that disproportion must be considered in light of jurisdictional limits between state authorities and Indian Reservations.

<sup>17</sup> See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 346, 363 (2007); Timothy D. Wilson et al., *A Model of Dual Attitudes*, 107 PSYCHOL. REV. 101, 103-104 (2000).

<sup>18</sup> See Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich, & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1223-26 (2009).

reduction of inappropriate lockups, more efficient use of incarceration, and more efficient targeting of resource delivery to offenders most likely to respond positively.<sup>19</sup>

The Minority Justice Committee has been investigating evidence-based sentencing tools and validation processes to ensure the objectivity and effectiveness of assessments at a local level. Validation involves extensive testing, including comparisons of assessment predictions against actual outcomes. This process reveals the statistical value of each variable, which allows testers to modify the assessment tool until its predications are statistically accurate. Because relevant variables can differ between local jurisdictions, validation must be performed at local levels to maintain predictive value.

Cass County implemented a program piloting the use of an evidence-based tool on a single judge's docket. At least one Committee member is monitoring this program and will provide feedback. The program objective is to implement a tool for use prior to a dispositional conference. This placement is intended to allow attorneys to advocate more effectively for appropriate case outcomes. Though the Cass project does not appear to rely on a full evidence-based process, it will help familiarize participants with relevant tools and techniques.<sup>20</sup> Increased familiarity will provide a basis of expertise to inform further implementation. Members are monitoring the program and the Committee will review results when they become available.

Effective implementation of evidence-based tools requires significant training. The Minority Justice Committee has reviewed a number of training programs, including *Evidence-Based Sentencing to Improve Public Safety and Reduce Recidivism: A Model Curriculum for Judges*. This program was developed through the cooperation of the National Judicial College, the National Center for State Courts, and the Crime and Justice Institute.<sup>21</sup> The program format was designed to be provided in cooperation between a corrections official and a court official, allowing each to contribute different perspectives and expertise. The Committee found that training for the use of evidence-based tools in North Dakota would be best provided through this NCSC program.

- **PRETRIAL EVIDENCE-BASED TOOLS**

*Courts should establish an objective screening tool for determining bail and should standardize bond schedules to ensure the equal treatment of Native Americans living on Indian Reservations.*

Evidence-based practices can be effectively applied in areas of the criminal process in addition to sentencing. Commission recommendations call for an objective pretrial tool to aid judicial bail

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<sup>19</sup> Research produced and compiled by the National Institute of Corrections is available at <http://nicic.gov/evidencebasedpractices>; For an example assessment of resource targeting for effectiveness see WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, RETURN ON INVESTMENT, EVIDENCE-BASED OPTIONS TO IMPROVE STATEWIDE OUTCOMES (2012); *see also* CASEY, PAMELA M., ROGER K. WARREN, & JENNIFER K. ELEK, USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING 2-8 (2011).

<sup>20</sup> Member assessments indicated that the process implemented appears to lack explanations of measured domains and recommendations.

<sup>21</sup> Available at [http://www.ncsc.org/sitecore/content/microsites/csi/home/~/\\_media/Microsites/Files/CSI/Education/Faculty\\_Handbook.ashx](http://www.ncsc.org/sitecore/content/microsites/csi/home/~/_media/Microsites/Files/CSI/Education/Faculty_Handbook.ashx).

determinations. To be considered objective, pretrial tools must be scientifically validated using a similar process as sentencing tools.

The Minority Justice Committee recognized that an assessment tool could provide information on offender risk and needs to help judges or a potential pretrial services provider determine appropriate diversion, detention, or other decisions. The Committee is reviewing research and models for pretrial implementation. An ideal tool would have a brief completion time. Court administrators have indicated that other state jurisdictions have developed predictive, validated detention tools containing as few as three questions. The Committee examined a variety of assessment tools for their potential for implementation or as models for the development of an original instrument. The implementation process, whether using a model or an original instrument, would involve working with specialists to norm the instrument to the state population. This process would eliminate or add questions depending on which provide the most predictive results.

Recent research has shown that many administrative arrangements for delivering pretrial assessments can be effective.<sup>22</sup> The national trend has been to provide pretrial services through probation departments. This delivery takes advantage of any existing infrastructure and assessment expertise. In North Dakota, the Department of Corrections has an interest in administering a pretrial assessment. A probation officer or a trained vendor could be trained to complete an assessment instrument during a 10 to 15 minute interview before a first appearance.

Current plans call for the creation of a pilot program to test and refine methods for applying a pretrial assessment tool. Focus for a potential pilot has been in Burleigh County because of the convenience of implementation, its large jail population, which includes many pretrial detainees, and the significant level of minority contact with the courts. Judicial officials, law enforcement, and representatives from Burleigh County, prosecutors, and public defenders met with the Minority Justice Committee on May 15, 2014 to discuss implementation of a pretrial pilot of an evidence-based assessment tool. All present agreed that a pilot program would be feasible.

The pilot will require the coordination of law enforcement, a judge willing to use the tool on his or her docket, and the Burleigh County Jail to take one-day snapshots of the jail population. Study populations could include felonies, serious misdemeanors, and DUIs. However, officials directly administering the program will most likely have wide discretion to select populations, in a similar manner to the current Cass County sentencing pilot. The instrument will identify people who do not require pretrial jail time. Information would be available to inform future decisions whether to modify bond practices.

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<sup>22</sup> See Pretrial Justice Institute & American Probation and Parole Association, *Promising Practices in Providing Pretrial Services Functions Within Probation Agencies: A User's Guide* (2010).

The Committee sent a formal letter inviting Judge Gail Hagerty to participate in a Burleigh County pilot program. Judge Hagerty is currently seeking input from the other judges regarding the risk assessment tool. She has indicated that cooperation with the state's attorney and sheriff's office will have to be secured before a pilot project can be undertaken.

The Minority Justice Committee took steps in 2015 towards the selection of a pretrial assessment tool designed to reduce detention of offenders who are at low-risk of failing to appear for court appearances and for committing crimes on release while awaiting disposition. Efforts continue to select an appropriate tool for North Dakota's population and initiate use of the assessment into pretrial practices in North Dakota.

- **STATE-TRIBAL RELATIONS – COOPERATIVE LAW ENFORCEMENT AGREEMENTS**

*Efforts should be made for collaboration between the state and the Indian tribes on honoring court orders and warrants.*

There are five federally recognized tribes and one Indian community located within North Dakota; the Mandan, Hidatsa, & Arikara Nation (Three Affiliated Tribes), the Spirit Lake Nation, the Standing Rock Sioux Tribe, the Turtle Mountain Band of Chippewa Indians, the Sisseton-Wahpeton Oyate Nation, and the Trenton Indian Service Area. Native Americans, as North Dakota's largest minority population, make up approximately 5 to 6 % of state's population.<sup>23</sup> State jurisdiction in Indian country is limited by tribal sovereignty and grants of exclusive jurisdiction to tribal or federal courts. The issue of which governing body has criminal jurisdiction is a complicated question and depends on several factors; whether the offense occurred in Indian country, the status of offenders and victims as Indian or non-Indian, and the type of crime.

The State of North Dakota has jurisdiction in Indian country when a non-Indian offender commits a non-federal crime against a non-Indian or when a non-Indian commits a victimless crime.<sup>24</sup> North Dakota has a unique jurisdictional relationship with the Spirit Lake Nation,<sup>25</sup> in that the State has concurrent jurisdiction with the tribe over misdemeanor crimes committed on the reservation.<sup>26</sup>

Testimony from the 2012 Final Report of the Commission suggested a need for better interaction and cooperation between tribal, state, and federal authorities.<sup>27</sup> Some individuals expressed concern that the state sometimes overstepped its jurisdiction in Indian country, while others seemed to perceive

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<sup>23</sup> Exact proportions depend on the year examined. See U.S. Census Bureau Population Division, Table 3: Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for North Dakota: April 1, 2000 to July 1, 2009; U.S. Census Bureau, 2010 State and County QuickFacts: North Dakota (2010), <http://quickfacts.census.gov/qfd/states/38000.html>.

<sup>24</sup> See N.D. Op. Att'y Gen. 2001-F-01 (indicating extensive but not exclusive state jurisdiction for victimless crimes in Indian country); N.D. Op. Att'y Gen. 93-L-244, pp. 3-4; see also AMERICAN INDIAN LAW DESKBOOK, note 2 at 160-61 (including general guidelines on Indian/non-Indian distinction).

<sup>25</sup> State v. Hook 476 N.W.2d 565 (N.D. 1991) (holding state criminal jurisdiction for non-major offenses committed by or against Indians on the Spirit Lake Reservation); N.D. Op. Att'y Gen. 93-L-244, p. 1; see also AMERICAN INDIAN LAW DESKBOOK, note 2 at 141 (noting that federal statutes sometimes authorize state jurisdiction over some or all crimes within Indian country).

<sup>26</sup> N.D. Op. Att'y Gen. 93-L-244, p. 1.

<sup>27</sup> Public Testimony, Turtle Mountain Reservation Transcript, pp. 10-12, 15-16 (Sept. 28, 2010) [hereinafter Turtle Mtn. Reservation Tr.]; Public Testimony, Bismarck Civic Center Transcript, pp. 3-6, 19-26 (Sept. 10, 2010) [hereinafter Bismarck Civic Ctr. Tr.].

the opposite, that state authorities could do more to help remedy certain difficulties on reservations.<sup>28</sup> In addition to efforts to cooperate in recognizing each jurisdiction's orders and warrants, the state and tribes continue to collaborate to enhance law enforcement cooperation.

The 2015 North Dakota Tribal-State Forum on Cooperative Law Enforcement Agreements was held in Bismarck in late July. The Bureau of Indian Affairs and the Tribal-State Committee organized the forum to discuss cooperative agreements between tribes, counties, and states.

The forum was attended by members of the MJI Committee, the full council from Spirit Lake, the chair and members of the Turtle Mountain council, the chairman designate from Standing Rock, and representation from Three Affiliated Tribes. Several officers from Montana shared their perspectives and experiences working with cooperative agreements for the past 15 years. The Montana agreements are between the tribe on the Fort Peck Reservation, two counties, two cities, and the state highway patrol. The MJI Committee received a report from the committee members who attended the forum:<sup>29</sup>

Some of the obstacles encountered in developing cooperative law enforcement agreements and collaboration between tribal and state law enforcement include the issues of tribal banishment, lack of interest from county law enforcement, and dispatch logistics. With respect to tribal banishment, many of the tribes use banishment as a sentence for drug dealing. Banishment, however, appears to be more form over substance and extradition may be more effective, where applicable. Often, the banished individual may remain in the area and continue to deal from an area just off the reservation. In addition, no one knows exactly what would result if it is challenged in court. New agreements and closer cooperation with tribes could help target offenders that remain near reservations but out of tribal jurisdiction, and could reduce disproportion in the prison system. The state can also provide more options for treatment and assistance for addicts than tribal jurisdictions, which potentially saves lives.

With respect to cross-deputization agreements between tribes and county, the interest level depends on the county. There are long histories of difficulties between some tribes and counties. For instance, at Fort Berthold, there is one county firmly in favor of cross-deputization, while others do not appear interested. There is also the problem of coordinating dispatch. Each county sheriff has a dispatch; there is no consolidated center. From a logistical standpoint, it would make the most sense to base dispatch out of the largest government in the area, which would require coordination and

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<sup>28</sup> Turtle Mtn. Reservation Tr., supra note 8 at pp. 10-12, 15-16; Bismarck Civic Ctr. Tr., supra note 8 at p. 3, 65-6 (mentioning interactions between state and tribal courts and suggesting state cooperation with tribal colleges to educate Native Americans about the system); Public Testimony, Fargo Transcript, pp. 61-62 (June 22, 2010) [hereinafter Fargo Tr.].

<sup>29</sup> Summary from August 13, 2015 Minority Justice Implementation Committee Meeting minutes, [https://www.ndcourts.gov/court/committees/min\\_justice/minutesAug2015.pdf](https://www.ndcourts.gov/court/committees/min_justice/minutesAug2015.pdf).

collaboration between the tribe and county. A cooperative agreement could be formed to run a consolidated emergency dispatch system and share expenses, but this would be a significant endeavor.

There is a need to have an operations plan in order to know exactly who has jurisdiction in a given situation. According to anecdotal accounts, sometimes officers from different jurisdictions want to take the same offender into custody, while at other times, all officers present try to avoid having to do so.

This forum and other joint meetings with North Dakota tribes have opened the doors of communication to begin the process of getting more cooperative law enforcement agreements in place. The Committee will participate in meetings such as the Tribal and State Court Affairs Committee, the legislative Tribal and State Relations Committee and others in 2016 with the goal of developing more cooperative law enforcement agreements.

- **JUVENILE JUSTICE – JUVENILE DETENTION SCREENING TOOL**

*A single statewide tool should be implemented to guide the decision to detain. The tool should include criteria that are related to the purpose of detention, measure objectively, and apply uniformly.*

The 2012 Race and Bias Commission Report analyzed arrest and detention rates for minority youth in North Dakota. Data from 2010, the most recent year analyzed, shows a minority secured detention rate slightly more than twice that of Whites. Juvenile arrests for Native Americans are over twice the rate as Whites, and African Americans show over four times the white rate. Cases for Native Americans, Hispanics/Latino(a)s, African Americans, and multi-racial youth were all at least one and a half times more likely to involve secure detention than Whites, and all groups except Native Americans were considerably less likely to have their cases diverted. The combined minority total for 2009 showed a somewhat greater likelihood of minority commitment to the Division of Juvenile Services than Whites, while, minority rates for other examined years were close to twice those of Whites. Native American youth, though only about 9 percent of the state juvenile population, account for 17 percent of juvenile arrests, 18 percent of cases petitioned by the juvenile court, and 30 percent of commitments to juvenile corrections.<sup>30</sup> Examination of 2009 county-level juvenile relative rates reveals Burleigh and Cass are the only two counties with statistically significant minority rates for processing points other than arrest and detention for that year.<sup>31</sup> Data from 2010 showed statistically significant minority rates at additional process points in other examined counties.<sup>32</sup> At the local level, disparities become even more evident, with minority arrest rates four to six times those of whites, depending on the year and county examined.

About half of citations for all races were given for status offenses, including alcohol possession or consumption, with no significant difference between minority groups and the majority population.<sup>33</sup>

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<sup>30</sup> NORTH DAKOTA DISPROPORTIONATE MINORITY CONTACT PLAN 6 (2010) [hereinafter DMC PLAN] at 6.

<sup>31</sup> It is worth noting that rates for points of contact other than arrests and detention in the available data do not reach the same level of disparity as each of these two points. *Id.* at 4.

<sup>32</sup> Email from Lisa Jahner, Juvenile Justice Program Analyst, North Dakota Association of Counties, to Andrew Frank, Staff to Commission to Study Racial and Ethnic Bias in the Courts (March 20, 2012) (containing RRI and explanation) (on file with the Commission).

<sup>33</sup> *Id.*

Over-representation of Native American juveniles tended to occur in the more serious crime categories, similar to trends for minority groups examined in broad national or multi-state studies.<sup>34</sup> The assessment found little improvement in the detention rate for Native Americans over previous years, and little to no relationship between the severity of offense and decisions to detain.<sup>35</sup> The majority of offenses were property or substance-related.<sup>36</sup> The researchers did not have adequate data to determine whether Native American youth face particular aggravating circumstances that contribute to detention decisions, and recommended a risk-based detention tool to facilitate a more objective decision making process.<sup>37</sup>

In January of 2014, the screening of detention youth began statewide in North Dakota. The detention risk screening tool includes set criteria to rate each youth brought to secure detention to assess if the risk to community is significant enough to warrant use of secure detention. The overall score guides the law enforcement officer or intake court officer in making the critical decision on detention. The purpose is to ensure appropriate release of youth back into the community. The primary objective is to minimize the risk of re-offending as well as failure to appear for a scheduled hearing. The score of the detention screen does not detail a course of action that should be taken. Rather it provides objective information (grounded in research) to enhance the decision-making process.

The use of the detention screening tool, which originated in the South Central Judicial District (i.e. Burleigh County), continues with the assistance of the Bismarck Police Youth Bureau. Federal training and technical assistance was awarded in 2014 to conduct a validation study of the tool to measure its success in terms of meeting public safety but also not detaining more youth than necessary. The Juvenile Court Director for the South Central Judicial District and the Juvenile Justice Specialist<sup>38</sup> has worked with the technical assistance provider to obtain the data used for the study period ending December 2014. The study report provided several recommendations to improve the utility of the tool, including broadening the population on which the tool is used to all juveniles with the potential to enter detention and additional analysis to determine the reason for “overrides” of the detention recommendations. The high frequency of tool overrides and lack of data identifying reasons for the overrides are concerning because they tend to show that the tool is not effective in identifying placement for the juvenile and/or the users of the tool do not trust its recommendation. The Committee continues to coordinate with the Juvenile Court directors to identify reasons for the problem areas and to improve the usefulness and validity of the detention screening tool.

- **JUVENILE JUSTICE – CULTURAL LIAISON PROGRAMS**

*Courts and law enforcement should establish and expand cultural liaisons to minority communities to provide education on the courts, police, and legal issues.*

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<sup>34</sup> Id.

<sup>35</sup> Id. at 18.

<sup>36</sup> Id.

<sup>37</sup> Examples of an “aggravating circumstances” would be failure to contact a parent or non-residence. Such circumstances could lead to temporary detainment, and a correlation with Native American race could suggest a particular set of aggravating circumstances for Native American youth. Id.

<sup>38</sup> The Juvenile Justice Specialist is an employee of the North Dakota Association of Counties who serves as Board Administrator to the Juvenile Justice Advisory Group. The Juvenile Justice Advisory Group was created under Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. 93-415, Sec. 223 and its primary function is to monitor compliance with the JJDP Act and work on juvenile justice reform, taking into account the latest research on adolescent development and the hallmarks of a developmental approach.

The courts established the Youth Cultural Achievement Program (YCAP) in November 2008, following the recommendations from the 2007 Burleigh County assessment. The program provides a juvenile court liaison focused on preventing Native American youth from entering the juvenile justice and child welfare systems, and on assisting the court and families in the South Central Judicial District. YCAP has been developing and implementing new programs, including crisis counseling, crisis intervention, mentors, culturally relevant programs, individual counseling, and family counseling.

A Title II Formula grant was awarded in 2014 by the Juvenile Justice State Advisory Group (SAG) to Youthworks to enhance the YCAP in the South Central Judicial District. Youthworks also operates a complimentary program, New Directions, which is an after school program for Native American high school students. Intake and assessment services for New Directions participants is provided by YCAP staff, as often these families may benefit from YCAP services as well. Referrals are made to the YCAP program by the Juvenile Court, school liaisons, or by concerned parents or family members. Any at-risk Native American youth is eligible for services at no cost to the family. Funding provided by the SAG in 2014 has allowed for an even higher level of prevention-focused services for additional counseling, case management, one-on-one mentoring, and a school-based group at the middle school level.

Since July 2015, North Dakota Juvenile Court has been contracting with Lutheran Social Services Restorative Justice to provide the Youth Cultural Achievement Program (YCAP) in Cass County for minority youth who have been in contact with law enforcement and/ or the juvenile justice system. YCAP seeks to support and connect youth with services that will prevent them from entering or progressing further into the justice system. Efforts so far have been focused on reducing the number of formal petitions required due to nonappearances at diversion or informal adjustments, reduction in pick-up orders and detention stays due to failures to appear for court hearings, and increased compliance with conditions of probation. The program also includes quarterly lunch hour trainings for justice system professionals on topics such as refugee resettlement, utilizing interpreters and trauma-based counseling for children and families. The Court Cultural Liaison is actively seeking to identify causes of disproportionate minority representation and develop services, education and outreach to address this issue.

The Police Department in Fargo also employs a cultural liaison officer to reach out to minority groups in the community. The department created the position to provide Fargo's large New American population (i.e. refugees, immigrants, and asylees) as well as the Native American population with a familiar face in law enforcement that they could reach out to with questions and concerns. The position collaborates with other service providers, elder groups, community or religious leaders, and social organizations. The position also teaches classes, hosts forums, and does regular home visits with social workers.

Currently, there are plans to further expand YCAP to the Devils Lake area in 2017.

## ***CIVIL JUSTICE***

The Commission Final Report focused on civil issues, including minority use of legal services, the provision of limited-scope legal services, and correlations between minority status and poverty in North Dakota. The Minority Justice Committee selected two civil recommendations for initial

implementation. These recommendations included adopting the Project PASSPORT protection order model format and supporting expansion of resources and education related to limited-scope services and self-representation.

- **PASSPORT PROTECTION ORDER**

*For ease of enforcement between state and tribal courts, courts should adopt the National Center for State Courts form of domestic violence protection order (PASSPORT).*

Project PASSPORT provides a standardized content and format for protection order cover sheets between jurisdictions. The intent of the project is to strengthen full faith and credit and increase the safety of domestic violence victims, regardless of the jurisdiction that issued the order and the location of enforcement. Standardization improves recognition and enforcement of orders between tribal and state jurisdictions, and between different state jurisdictions. The model cover sheet template places key protection order data up front, on a single page, and in a uniform and recognizable manner to facilitate easy recognition and enforcement.

Project PASSPORT began with the creation and adoption of the model template among several states in 2000.<sup>39</sup> Use of the model subsequently expanded to a majority of states.<sup>40</sup> According to Minority Justice Committee discussions, several North Dakota Tribes have adopted the PASSPORT model, including Standing Rock and Turtle Mountain reservations. North Dakota State Court Administration discussed PASSPORT adoption during the project's initial stages. At that time, computer systems faced a number of technical obstacles to full implementation. However, the PASSPORT model content influenced the content of the state protection order and cover sheet that were ultimately developed.

The Commission Final Report recommended full implementation of PASSPORT with the goal of increasing law enforcement protection for domestic violence victims across state and tribal jurisdictions. The Minority Justice Committee noted that both Montana and South Dakota courts, as well as neighboring tribal jurisdictions, have all adopted PASSPORT. Some jurisdictions have implemented the project as recently as 2008. When contacted, Montana and South Dakota officials reported that the program has been effective and has increased state cooperation with tribal courts. Committee members recognized that North Dakota's oil boom and growing population have increased movement between Indian Reservations, state jurisdictions, and neighboring states.

The Committee drafted a modified model cover sheet and initiated discussions with technical experts from the Office of the North Dakota Attorney General, which oversees state protection orders. Topics

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<sup>39</sup> See NATIONAL CENTER FOR STATE COURTS, EXTENDING PROJECT PASSPORT (2013), available at <http://www.yawaandcourts.org/~media/Microsites/Files/VAWA/Passport%20Items/Passport%20Project%20Description%202014.ashx>; KENTUCKY DOMESTIC VIOLENCE ASSOCIATION (KDVA), PROJECT PASSPORT: REGIONAL IMPLEMENTATION OF THE FULL FAITH AND CREDIT FOR PROVISION OF THE VIOLENCE AGAINST WOMEN ACT (1999), available at <http://www.yawaandcourts.org/~media/Microsites/Files/Passprt/Original%20Passport%20to%20Safety%20Blue%20Book.ashx>; see also TRIBAL LAW AND POLICY INSTITUTE, PROMISING STRATEGIES: TRIBAL-STATE COURT RELATIONS 1-5 (2013).

<sup>40</sup> See <http://www.yawaandcourts.org/Cross-Jurisdictional-Efforts/Extending-Project-Passport.aspx>.

included: issues surrounding adoption, modification of the model cover sheet to reflect state requirements and practices, and compatibility with computer programs including the court's case management system and law enforcement systems.<sup>41</sup> Discussions suggested that existing cover sheets may not be consistently passed on to law enforcement officials along with protection orders. Additional law enforcement training would be necessary to ensure the inclusion of cover sheets with the orders.

Minority Justice Committee members, experts from the Office of the Attorney General (AG Office), and court staff presented PASSPORT information at the 28 March 2014 State and Tribal Relations Committee. The presentation included a modified PASSPORT draft. Attendees included law enforcement officials, several Tribal Chairs, and officials from tribal courts. By this time, a significant portion of the implementation was completed, including re-drafting of a state cover sheet into a format similar to the PASSPORT model. This new cover sheet had been incorporated into the relevant state systems. State law enforcement and Tribal Chairs responded positively to the proposed PASSPORT implementation. The State and Tribal Relations Committee agreed that the next step will be for those tribes that do not use PASSPORT to consider adoption and implementation. Tribal Chairs indicated that they would propose and discuss adoption with tribal officials.

In addition to the adoption of a uniform cover sheet, a second goal of Project PASSPORT involves computer automation for protection order data. The PASSPORT Project advocates modifying electronic processes to allow data to flow through case management systems and justice system agencies, and eventually reach databases accessible to foreign jurisdictions.<sup>42</sup> However, there may be considerable technical problems involved in coordinating existing systems from different jurisdictions and developing systems in jurisdictions with few resources. The Minority Justice Committee approached technological issues separately from the issue of cover sheet standardization because of the different levels of difficulty for implementing each.

Committee discussions have focused on developing a method of including tribal protection orders in the state computer system. Inclusion would further assist state and tribal law enforcement officers in identifying and enforcing protection orders from foreign jurisdictions. State technology experts indicated that inclusion of tribal orders within the state system appears to be technically feasible. The Committee acknowledged that this effort would depend substantially on Tribal Courts establishing methods to provide the orders for inclusion.

Discussions confirmed that there is no integration of protection orders from tribal courts into the state system, but also suggested several potential methods for inclusion. These methods include: entering tribal orders into Odyssey using an existing method for registering foreign protection orders with the

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<sup>41</sup> Discussion of modifications to the cover sheet included: expiration issues and removal of space for the social security number.

<sup>42</sup> See NATIONAL CENTER FOR STATE COURTS, EXTENDING PROJECT PASSPORT 2 (2013), available at <http://www.vawaandcourts.org/~media/Microsites/Files/VAWA/Passport%20Items/Passport%20Project%20Description%202014.ashx>.

state courts; direct entry of tribal orders into the FBI National Crime Information Center (NCIC) database, which would allow state access through the NCIC website; or the development of a web portal to allow direct entry of information into state systems by tribal authorities. In addition, each of these methods would require tribes to maintain a consistent point of contact to verify whether received orders are current and accurate, and to provide any missing required data. Federal databases maintain rigorous data requirements and reject records with incomplete data.

Currently, North Dakota protection order data passes through court system computers to state Bureau of Criminal Investigation databases, where it is available statewide. However, this data is not automatically passed on to federal systems, which would allow foreign jurisdictions access. Instead, protection order data must be entered directly into the federal system by local law enforcement. Discussions with federal authorities revealed that that very few North Dakota protection orders are entered in this manner. The North Dakota Attorney General's Office and the State Information Technology Department have been working on a method to automatically send North Dakota state protection orders to the federal system and plan to begin the automatic upload process in June 2016. Once implementation is complete, tribal protection orders that are entered into the state system through any of the suggested methods will be automatically sent to federal databases along with state orders.

- **LIMITED-SCOPE SERVICES**

*Courts should support the provision of unbundled legal services to the public.*

Limited-scope services are contractual arrangements that allow self-representing clients to hire attorneys to complete discrete tasks without retaining them for an entire case. For example, a self-represented citizen might seek a limited-scope arrangement in which an attorney performs research, drafts a complaint, or makes an appearance for the client, without providing additional services. This arrangement allows self-represented litigants to take advantage of at least some affordable attorney services and creates flexibility for attorneys, who may offer a variety of services at designated prices.

The Commission analyzed limited-scope services as a method that could increase minority access to courts. The Race and Bias Commission found that North Dakota minorities disproportionately rely on no-cost or low-cost services.<sup>43</sup> Evidence indicated that disproportionate reliance can be attributed largely to minority over-representation at or near poverty level. Research conducted at the national level indicates that unbundling is an important element in providing legal services to self-represented

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<sup>43</sup> See North Dakota Commission to Study Racial and Ethnic Bias in the Courts: Final Report and Recommendations 115-117 (2012) (Relying primarily on data collected by Legal Services of North Dakota).

litigants.<sup>44</sup> Best practices recommend creating a method of referral to attorneys offering low cost limited-scope services.<sup>45</sup>

Both the Race and Bias Commission and the Minority Justice Committee acknowledged that courts and the State Bar of North Dakota (SBAND) have reviewed rules to facilitate unbundling, but there are few resources available for education and support. In addition, SBAND confirmed a lack of information on current levels of interest or use in North Dakota. Committee members suggested that North Dakota attorneys tend to respond positively to the idea of unbundling, but are uneasy about offering services. To confirm this, the Committee developed and implemented two surveys of perceptions, familiarity, and experience of limited-scope services among attorneys and judges. The first survey was distributed to SBAND members. The survey collected data on familiarity and provision of unbundled services among practicing attorneys. The second survey collected information from state judges on use of limited-scope services in courtrooms and potential education programs. Information from these surveys indicated that, though large majorities of respondents felt they had basic knowledge of limited-scope services and many had considered offering them, there were concerns about potential disciplinary issues, and whether courts would respect a limited-scope agreement or compel continued representation.<sup>46</sup> Respondents overwhelmingly agreed that state resources supporting limited-scope services should be expanded.

The Committee reviewed materials and example resources designed to assist attorneys providing limited-scope services. Materials included model forms and best practices from a variety of sources. Resources included checklists and guidelines created by Stephanie Kimbro, a Florida attorney who helped found the first law firm to offer limited-scope services, exclusively.<sup>47</sup> These and similar resources could be modified to meet needs specific to North Dakota, and could be made available for use in educational programs. Lawyers may not be aware that they can generate income offering unbundled services to aid pro-se litigants, even to those unable to afford full representation. In addition, low-income citizens may be unaware of availability of limited-scope services and may therefore automatically rule out hiring an attorney based on cost.

The Committee researched rules used by other states to find language that could help to clarify concerns surrounding limited-scope services. The Committee agreed that language from the state of Nebraska should be added to the North Dakota rules, and modifications were drafted. The Committee approved drafts and forwarded them to the Joint Procedure Committee for consideration.

Members proposed development of a model limited-scope agreement to provide attorneys with some assurance that courts will respect limited-scope arrangements and to help address any fear of

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<sup>44</sup> See NATIONAL CENTER FOR STATE COURTS, THE DISCRETE TASK ASSISTANCE PROGRAM: A LOW COST ATTORNEY ASSISTANCE SOLUTION FOR ACCESS TO JUSTICE PROBLEMS (2006); AMERICAN BAR ASSOCIATION, HANDBOOK ON LIMITED-SCOPE LEGAL ASSISTANCE 8-12 (2003).

<sup>45</sup> See National Center for State Courts, The Discrete Task Assistance Program: A Low Cost Attorney Assistance Solution for Access to Justice Problems (2006).

<sup>46</sup> Based on the sample and population sizes, a 6.9% margin of error was calculated at a 90% confidence interval. This margin varies slightly for each question, depending on the number of respondents. However, conclusions related in this report are drawn from questions in which responses were extremely one-sided, well outside of margins of error.

<sup>47</sup> For a description of the firm, as well as considerable resources to aid in the provision of unbundled services, see STEPHANIE KIMBRO, LIMITED-SCOPE LEGAL SERVICES: UNBUNDLING AND THE SELF-HELP CLIENT (2013).

professional discipline. Resources and education programs could further reduce apprehension about providing limited-scope services. Committee discussions have focused on working with SBAND to develop a CLE, online seminar, or educational events featuring appropriate speakers. SBAND indicated that it should be able to provide future informational access to justice or pro-bono programs.

- **SELF-REPRESENTATION**

*Courts should explore the development of a legal services ombudsman position to provide information and guidance to members of the public regarding the court system.*

*Courts should expand materials to facilitate self-representation and adequate notice of existing materials.*

The Minority Justice Committee began considering Commission recommendations on limited-scope services and self-help just prior to the creation of the new North Dakota Legal Self-Help Center. The Self-Help Center essentially fulfills another Commission recommendation calling for the creation of an ombudsman position to provide guidance and information on the legal system for members of the public. The Minority Justice Committee has met with the program coordinator to discuss self-help issues, minority needs, and areas in which the Committee can provide assistance. The Committee shared information collected during its study of self-representation and minority issues. This information included best practices for creating and structuring various self-representation programs, including unbundling, judicial education, courtroom-process programs, and libraries. These best practices are based on the experiences of states that have undertaken such programs. Resources also included the checklists, guidelines, and model forms for limited-scope services.<sup>48</sup>

The Legal Self-Help Center has been working to expand materials to facilitate self-representation. The Center has begun development of a web page with basic advice such as tips, an outline of court processes, and other information for the public. The Center's main priority, however, has been the development of forms, including name change requests and powers of attorney, as well as samples of settlement agreements and parenting plans.

Developing a method for the Legal Self-Help Center to connect self-represented litigants to attorneys offering appropriate limited-scope services could increase the scope and effectiveness of the program. Such a method could also increase state effectiveness in providing legal access to minorities disproportionately represented at or near the poverty level. Several commercial websites designed to connect self-represented litigants with attorneys are currently being operated in California, and could provide models for North Dakota efforts.<sup>49</sup>

## **COURT PERSONNEL AND LEGAL PROFESSION**

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<sup>48</sup> See Stephanie Kimbro, Limited-scope Legal Services: Unbundling and the Self-Help Client (2013).

<sup>49</sup> See e.g. <https://www.pro-se-litigation.com/>.

The Commission study focused in part on minority representation and opportunities within the legal profession and the state courts. This focus followed general research findings that state courts and bar associations that adequately reflect community populations create a sense of ownership and trust, as well as confidence in their ability to understand minority issues. This effect, in turn, creates a greater willingness to participate in the system by bringing cases, serving as jurors, and in other capacities.<sup>50</sup> The Committee chose to focus on outreach programming recommendations to recruit minorities to pursue a career in the legal field and to increase the public's understanding of the legal system.

- **EDUCATION PROGRAM: NATIVE AMERICAN LAW STUDENTS ASSOCIATION**

*Courts should develop outreach programs to minorities to generate interest in pursuing careers in the legal system.*

*The implementation committee should partner with the State Bar Association of North Dakota, the University of North Dakota School of law, law enforcement, tribal, state, and county governments, and community groups to develop outreach initiatives to broaden access to and improve public understanding of legal issues and the legal system, especially for Native Americans and other minorities in the state.*

Race and Bias Commission research found a general lack of public knowledge of the court system. Testimony from minorities suggested a similar lack of knowledge within reservation and other minority communities. Thanks to member efforts, the Minority Justice Committee has an opportunity to work with the University of North Dakota Native American Law Students Association (NALSA) to develop public education programs. Discussion between Committee members and NALSA representatives revealed enthusiasm for cooperative efforts. Commission listening sessions highlighted a need for knowledge of the jury process. Research indicated that residents on Indian Reservations may not be aware that they are required to serve on both state and tribal juries. In addition, courts do not appear to have effectively emphasized the importance of responding to jury summons in order to ensure that state juries accurately represent local communities. Education programs would emphasize the need for the unique perspectives of minority jurors and the possibility of increased fairness from more diverse juries, especially in cases with minority defendants. The Committee found a number of legal education resources designed for educational levels from high school to college that could be provided to members of the public or used as models for original North Dakota programs.<sup>51</sup>

Additional suggestions included presenting to criminal justice courses and encouraging interested minority students to pursue legal careers. Members observed that a wide range of tribal members have become involved with tribal colleges, including many elders and young people. Outreach through

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<sup>50</sup> See North Dakota Commission to Study Racial and Ethnic Bias in the Courts: Final Report and Recommendations 140-148 (2012).

<sup>51</sup> See e.g. <http://www.streetlaw.org/en/home> (Providing free educational programs on topics including jury service, representation, criminal law, civil law, among other areas).

colleges would not only aid in the provision of educational programs, but also help establish and strengthen ties and working relationships throughout Reservation communities.

The Commission recognized the importance of outreach as early as the high school level. The Minority Justice Committee agreed that creating a pipeline similar to the In-Med program, which has contributed to the success of the University of North Dakota medical school, would benefit the state legal profession. NALSA representatives said work experience in courts contributed to the decision to enter law school. NALSA participation could facilitate creation of methods of connecting students or recent graduates with state or tribal internships and jobs.

The Committee's goal is to help create a package of resources to provide a basis for review and development of a North Dakota effort. In addition, the Committee is examining examples of professional mentorships for high school students. Such mentorships would facilitate periodic, informal meetings between interested students and legal professionals to provide students insight into the profession. General background work has progressed in all of these areas, but additional work will be required to determine the structure and funding for new programs.

## CONCLUSION

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Minority Justice Committee work has depended heavily on member participation to initiate steps toward implementation. Implementation has required members to communicate and coordinate between the Committee, courts, and other interested organizations. Meetings have functioned as a forum allowing members to provide analysis and updates on their relevant areas of expertise, which have guided decisions on steps toward implementation time frames, structures, and requirements. The Committee has provided additional support through research on best practices and development of necessary materials.

While implementation of long-term recommendations will continue, additional recommendations will be included on forthcoming Committee agendas. The Committee's goal is to continue concentrating on a selection of recommendations from the access to courts, criminal and juvenile, civil, legal profession and court personnel study areas. This broad approach will take advantage of the varied expertise offered by Committee members.